

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KEVIN ALMY,

Plaintiff,

v.

D. DAVIS, *et al.*,

Defendants.

* * *

2:12-cv-00129-JCM -VCF

ORDER

(Motion To Submit Plaintiff for Physical Exam #80)

Before the court is plaintiff Kevin Almy's Motion To Submit Plaintiff for Physical Exam. (#80). Defendants D. Davis, *et al* filed an Opposition (#80), and plaintiff did not file a Reply.

A. Relevant Background

Plaintiff Almy filed his motion to proceed *in forma pauperis* (#1) and complaint (#1-1) on January 14, 2012. On January 24, 2012, plaintiff filed a motion to appoint counsel and to file enlarged complaint. (#2 and #3). On January 31, 2012, and February 2, 2012, the plaintiff filed two additional motions for appointment of counsel. (#4 and #5). On April 4, 2012, plaintiff filed an amended complaint (#6) and a motion to amend complaint (#7). On May 23, 2012, the plaintiff filed a letter requesting a status of his case. (#8). On June 18, 2012, the court issued a screening order granting the motion to amend complaint (#7), denying plaintiff's motions for counsel (#2, #4, and #5), and denying plaintiff's motion to file enlarged complaint (#3) as moot. (#9). The screening order also dismissed several claims and deferred ruling on the motion to proceed *in forma pauperis* (#1) until the parties had an opportunity to settle the dispute via mediation. *Id.*

On June 28, 2012, the court issued an order scheduling the matter for an inmate early mediation conference. (#10). The conference was held on August 10, 2012, and the parties did not settle. (#12). The court issued an order on August 13, 2012, granting the motion to proceed *in forma pauperis* (#1),

1 ordering partial payment of the filing fees, and ordering service on the defendants. (#13). On October
2 11, 2012, the defendants filed a partial motion to dismiss. (#27). Plaintiff filed a motion to extend time
3 to respond to the motion to dismiss (#27). (#60). The court granted plaintiff's motion (#60) on
4 November 28, 2012. (#61).

5 On January 10, 2013, plaintiff filed a motion for hearing/production of prisoner. (#78). On
6 January 16, 2013, plaintiff filed a notice of partial motion to dismiss (#79), and on January 17, 2013,
7 plaintiff filed a motion to submit plaintiff for physical exam (#80). On January 23, 2013, defendants
8 filed a response to the notice (#79), and on January 24, 2013, defendants filed a response to the motion
9 for hearing/production of prisoner (#83). On January 28, 2013, plaintiff filed a motion for the District
10 Judge to amend order #61 (#84) and a motion for order to serve summons and civil complaint (#85).
11 On February 1, 2013, defendants filed the instant motion to extend time to respond to plaintiff's motion
12 to submit to physical exam (#80). (#86).

13 Plaintiff filed a reply in support of his motion for hearing/production of prisoner on February
14 12, 2013. (#88). On February 13, 2013, plaintiff filed an opposition to defendants' motion to extend
15 time (#86). (#89). On February 15, 2013, defendants filed a reply in support of their motion for
16 extension of time. (#90). Defendants filed an opposition to the plaintiff's motion to submit to physical
17 exam (#80). (#91). On February 20, 2013, the court issued an order granting plaintiff's motion for
18 order to serve summons and complaint (#85). (#92). On February 21, 2013, summons were issued as
19 to Brandon Davis and Richard Nelson. (#93 and #93-1). On February 25, 2013, plaintiff filed an
20 opposition to the motion to dismiss (#27). (#94).

21 On February 28, 2013, the court issued an order granting the motion to extend time to respond
22 (#86) to motion to submit plaintiff to physical exam (#80). (#95). The court did not set an opposition
23 deadline as defendants had already filed their opposition (#91). *Id.* On March 1, 2013, plaintiff filed
24 a motion for sanctions (#96), motion for waiver of page limitations (#97), and motion to amend order
25 (#98). Plaintiff's reply in support of his motion to submit plaintiff to physical examination (#80) was
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1 due on March 1, 2013. Plaintiff did not file a reply.

2 **B. Plaintiff's Motion To Submit For Physical Exam**

3 **1. Arguments**

4 Plaintiff asks this court to submit him to a "physical exam by Dr. George Michael Elkanich
5 and/or other staff of Bone & Joint Specialists of Las Vegas, Nevada, for purposes of being an expert
6 witness on behalf of the plaintiff..." (#80). Plaintiff asserts that he suffered multiple serious injuries
7 in a rollover car accident in 2004, including "severe tearing of the left shoulder tendons and muscles."
8 *Id.* Plaintiff states that Dr. Elkanich ordered him to undergo physical therapy for his shoulder and
9 performed two surgeries on his shoulder. *Id.* Plaintiff claims that several incidents that occurred at the
10 Nevada Department of Corrections (hereinafter "NDOC") facilities caused further injuries to his
11 shoulder. *Id.*

12 Plaintiff asserts that Federal Rule of Civil Procedure 35 permits the court to order the physical
13 examination of plaintiff and that "good cause" exists for the examination, because (1) plaintiff has the
14 right to have an expert witness, (2) plaintiff continues to suffer pain, diminished strength, and range of
15 motion, (3) plaintiff's pain has "imposed limitations on exercise thereby imposing adverse health
16 implications," (4) NDOC has declined/refused to provide anything for plaintiff's pain, (5) NDOC has
17 done nothing to repair the injuries inflicted by malicious and sadistic prison officials, (6) Dr. Elkanich
18 "is best qualified to determine the extent of re-tearing/re-injury, and (7) any examination or reports by
19 NDOC medical "this long after the injury would be suspect [of being] self serving." *Id.* Plaintiff also
20 proposes a plan to bring him to the doctor's office and offers to pay the expense of any medical
21 procedures Dr. Elkanich deems necessary. *Id.*

22 Defendants oppose the motion (#80) for several reasons, including: (1) Rule 35 does not
23 authorize a litigant to seek his own physical examination, (2) plaintiff does not need a medical expert
24 to establish the elements of his claims, (3) plaintiff is not permitted to seek supplemental medical
25 treatment, and (4) the logistics of plaintiff's proposal are "unworkable." (#91). The defendants also

1 assert that plaintiff has not demonstrated that Dr. Elkanich has consented to conducting the physical
 2 exam or to being an expert witness in this action, and that plaintiff does not have the funds in his inmate
 3 account to pay for the transportation, the exam, or the costs of an expert. *Id.*

4 **2. Relevant Law/Discussion**

5 **a. Rule 35**

6 Rule 35(a)(1) states that “[t]he court where the action is pending may order a party whose mental
 7 or physical condition--including blood group--is in controversy to submit to a physical or mental
 8 examination by a suitably licensed or certified examiner. The court has the same authority to order a
 9 party to produce for examination a person who is in its custody or under its legal control.” Fed. R. Civ.
 10 P. 35(a)(1). An order for the physical examination “may be made only on motion for good cause and
 11 on notice to all parties and the person to be examined; and must specify the time, place, manner,
 12 conditions, and scope of the examination, as well as the person or persons who will perform it.” Fed.
 13 R. Civ. P. 35(1)(2)(A) and (B).

14 Rule 35 “does not vest the court with authority to appoint an expert to examine a party wishing
 15 an examination of himself. Instead, under appropriate circumstances, it allows the court to order a party
 16 to submit to a physical examination at the request of an opposing party.” *Smith v. Carroll*, 602 F. Supp.
 17 2d 521, 526 (D. Del. 2009)(emphasis added); See also *Brown v. United States*, 74 F. App'x 611, 614
 18 (7th Cir. 2003) (holding that Rule 35 does not permit the court to appoint an expert to examine a party
 19 wishing an examination of himself and only, in certain circumstances, allows the court to order a party
 20 to submit to a physical examination at the request of an opposing party).

21 Plaintiff asks this court to submit him to a physical examination so that Dr. Elkanich can act as
 22 his expert and adequately determine the extent of his shoulder injuries. (#80). As previous courts have
 23 held, Rule 35 does not give this court the authority to appoint an expert to examine the plaintiff who
 24 is seeking examination of himself. *Smith*, 602 F. Supp. 2d at 526; *Brown*, 74 F. App'x at 614.
 25 Plaintiff's request to be submitted for a physical exam under Rule 35 (#80) in denied. *Id.*

1 **b. Rule 706(a)**

2 “The district court has the discretion to appoint an expert pursuant to Rule 706(a) of the Federal
3 Rules of Evidence, which reads, in part, “[t]he court may on its own motion or on the motion of any
4 party enter an order to show cause why expert witnesses should not be appointed” *Lopez v.*
5 *Scribner*, CVF045595OWWDLBP, 2007 WL 1215420 (E.D. Cal. Apr. 24, 2007) (citing Fed. R. Evid.
6 706(a); *Walker v. American Home Shield Long Term Disability Plan*, 180 F.3d 1065, 1071 (9th
7 Cir.1999)). “The plain language of section 1915 does not provide for the appointment of expert
8 witnesses to aid an indigent litigant.” *Hannah v. United States*, 523 F.3d 597, 601 (5th Cir. 2008)
9 (quoting *Pedraza v. Jones*, 71 F.3d 194, 196 (5th Cir.1995)). Pursuant to Rule 706, however, the court
10 has discretion to apportion costs in the manner directed by the court, including the apportionment of
11 costs to one side. Fed. R. Evid. 706(b). In situations such as this, where a plaintiff is proceeding in
12 forma pauperis and is presumably unable to pay for an expert,¹ and the government would bear the cost
13 of appointing the expert, the “court should exercise caution.” *Id.*

14 “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand
15 the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,
16 experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Fed. R.
17 Evid. 702. The decision whether or not to admit expert testimony does not rest upon the existence or
18 strength of the expert's opinion but rather whether the expert testimony will assist the trier of fact in
19 drawing its own conclusion as to a fact in issue. *Lopez*, 2007 WL 1215420 *1 (citing *United States v.*
20 *Rahm*, 993 F.2d 1405, 1412 (9th Cir.1993).

21 Plaintiff asserts claims for excessive force in violation of the Eighth Amendment. (#9). To
22 prevail on a claim for excessive force, the plaintiff must establish that force was used “maliciously and
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24 ¹ Plaintiff states that he would “absorb the costs of Dr. Elkanich’s examination” (#80), but the defendants
25 provided the court with a copy of the plaintiff’s inmate account inquiry demonstrating that plaintiff has \$00.07 in his
26 account and owes \$355.41 (#91-4 Exhibit D).

1 sadistically for the purpose of causing harm,” rather than “in a good-faith effort to maintain or restore
2 discipline.” *Hudson v. McMillian*, 503 U.S. 1, 7 (1992). Plaintiff does not need to establish that his
3 injury was “significant, serious, or more than minor.” *Gomez v. Chandler*, 163 F.3d 921 (5th Cir. 1999).

4 An expert will not assist the trier of fact in understanding if the defendants’ alleged use of force
5 was malicious and sadistic for the purpose of causing harm. As this element “does not depend on
6 technical determinations, but instead hinges on the intent of the prison administrators,” and no
7 “scientific, technical, or other special knowledge” is required to help the trier of fact, an expert is not
8 necessary for plaintiff to present his case to a jury. *See Salcido v. Zarek*, 237 F. App’x 151, 152 (9th Cir.
9 2007)(holding that the District court did not err in denying plaintiff’s request for an expert where the
10 case depended on the defendants’ intent in providing medical care to plaintiff); Fed. R. Evid. 702 (“A
11 witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify
12 in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized
13 knowledge will help the trier of fact to understand the evidence or to determine a fact in issue...”).

14 The expert is also not necessary to establish that plaintiff was injured. As plaintiff claims that
15 he went to the infirmary after the incidents, plaintiff’s medical records will demonstrate any injuries
16 suffered. Appointing an expert to conduct a physical examination to determine the severity of his re-
17 injury or the re-tearing of his shoulder is unnecessary. *Gomez*, 163 F.3d 921 (holding that
18 demonstrating the severity of injury is not required).

19 To the extent plaintiff’s motion (#80) seeks the appointment of an expert to testify on his behalf
20 regarding his Eighth Amendment claims, the request is denied.

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1 Accordingly, and for good cause shown,

2 IT IS HEREBY ORDERED that plaintiff Kevin Almy's Motion To Submit Plaintiff for
3 Physical Exam (#80) is DENIED.

4 DATED this 5th day of March, 2013.

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7 **CAM FERENBACH**
8 **UNITED STATES MAGISTRATE JUDGE**
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